United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,251

56

LEON BARTLEY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

John W. Karr
Paul J. McElligott

644 Washington Building
Washington, D. C., 20005

Attorneys for Appellant,
(Appointed by the
District Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether Government's evidence (simply that decedent's death resulted from shooting by defendant) made out *prima facie* case (that defendant was guilty of crime of manslaughter) sufficient to warrant trial court's denial of defendant's motion for judgment of acquittal at close of Government's case.

2. Whether jury's acceptance of only defense offered (self-defense), as manifested by its acquittal of greater offense, barred conviction of lesser offense to which the same defense necessarily applied, and whether trial court's denial of motion for judgment of acquittal n.o.v. was, accordingly, reversible error.

I N D E X

TABLE OF AUTHORITIES

* Authorities chiefly relied upon by appellant.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,251

LEON BARTLEY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

B R I E F F O R A P P E L L A N T

JURISDICTIONAL STATEMENT

This appeal is from a judgment and commitment of the District Court dated October 11, 1963, by which appellant was convicted of assault with a dangerous weapon and sentenced to a term of imprisonment of two to six years. On October 21, 1963, appellant filed an application for leave to appeal from this judgment without prepayment of costs, which was granted on that date. The District Court had jurisdiction under D. C.

Code, Secs. 11-305 and 11-306 (1961), and this Court has jurisdiction under 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

On August 21, 1961, an indictment was returned against appellant in the United States District Court for the District of Columbia for Second degree murder, charging that he had caused the death of one Calvin Nicholson on July 29, 1961, by pistol shot. He was brought to trial on the charge of manslaughter on September 23, 1961,[1/] and the jury returned a verdict of guilty of assault with a dangerous weapon on September 27, 1963. On October 11, 1963, appellant was sentenced by Judge Youngdahl to a prison term of from two to six years.

The Government offered testimony from police Officers Miller (T.R. 102), Gough (T.R. 118) and Couture (T.R. 129) and Drs. Uzer (T.R. 99) and Rayford (T.R. 112). The Court admitted in evidence the government's three proffered exhibits, a gun (T.R. 121), a pocketknife (T.R. 106) and several bullets (T.R. 121). The prosecution then rested its case (T.R. 135).

1/ Appellant had been convicted in January, 1962 of manslaughter. This conviction was reversed, and the case remanded, by this Court. Bartley v. United States, 115 U.S. App. D. C. 316.

Dr. Uzer testified that he had been the physician on duty when decedent's body was brought to Casualty Hospital following the shooting (T.R. 99, 100). He examined the body and determined that it was lifeless.

Dr. Rayford, a deputy coroner, testified that he had performed the post-mortem examination of decedent's remains, and that, in his opinion, decedent's death had been caused by a single gunshot wound. (T.R. 113, 115, 116).

Police officer Miller testified that he investigated the shooting, responded to the scene, had the decedent identified, and summoned an ambulance (T.R. 103, 104).

Police officer Gough testified that he also responded to the scene of the shooting, and that, as the result of information gathered there, went to the home of appellant and arrested him. The only words spoken by appellant, according to Mr. Gough, were, "I am the fellow that shot Calvin" (T.R. 120) and "(the gun is) on top of the refrigerator" (T.R. 120). When asked if appellant had given any explanation for the shooting, officer Gough replied, "No, he gave no explanation as to why he shot him, except that on the way to the station he said he had some trouble with him." (T.R. 121).

Police officer Couture testified that he had investigated the shooting, and had spoken with appellant as he was being led away from his house by officer Gough. Officer

Couture's entire conversation with appellant was, "Did you do the shooting? He said yes. What did you do with the gun? He said I gave it to the detective." (T.R. 131).

After admission of the exhibits, the prosecution rested. Appellant moved for a judgment of acquittal (T.R. 135), assigning as his reason the government's failure to present a prima facie case, (T.R. 137, 138). This motion was denied (T.R. 136).

Appellant then presented his evidence, providing the details of the shooting and the events which led up to it (T.R. 140-229).

Appellant admitted shooting the decedent, and defended by claiming that he had shot in self-defense.

At the close of all the evidence, appellant renewed his motion for judgment of acquittal, and the motion was again denied. (T.R. 240).

At the close of the case, appellant moved for judgment of acquittal, n.o.v., which motion was also denied (T.R. 296, 297).

STATUTES AND RULES INVOLVED

Rule 29 (a), Federal Rules of Criminal Procedure, provides:

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charge or an offense necessarily included therein if the attempt is an offense.

STATEMENT OF POINTS

1. Appellant's motion for judgment of acquittal made at close of government's case, on grounds that prosecution had failed to prove prima facie case, should have been granted.

2. Appellant's motion for judgment of acquittal n.o.v. made after jury had returned its verdict, on ground that verdict was inconsistent with the evidence, should have been granted.

SUMMARY OF ARGUMENT

Appellant's motion for judgment of acquittal should have been granted. The government proved only that decedent's death had resulted from a gunshot wound administered by appellant.

An explanation of the shooting was not offered. No evidence of defendant's mens rea was offered; no evidence was offered to suggest that the killing was unlawful. Accordingly, the government failed to make out a prima facie case, and appellant's motion should have been granted.

The waiver doctrine should be re-examined by this Court, and should be discarded. Rule 29 (a), Federal Rules of Criminal Procedure, requires an acquittal at the close of the government's case, if the state of the evidence warrants it. Appellant cannot, therefore, waive the court's performance

of an act compelled by the rules. Also, cogent reasons of public policy militate in favor of discarding the waiver doctrine.

Appellant's motion for judgment of acquittal, n.o.v. should have been granted.

The only defense offered was that of self-defense. That defendant was killed by appellant was admitted. The only question was whether the killing was lawful or unlawful. The only basis for declaring the killing lawful was an acceptance of the self-defense theory. The jury found that the killing was lawful. If the killing was lawful, it is logically impossible to make the act which produced the killing unlawful. If the jury found that appellant had the right to kill, it was compelled to find that he had the right to shoot. The verdict should have been set aside by the Court and a judgment of acquittal entered.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT CLOSE OF GOVERNMENT'S CASE.

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: T.R. 114-116, incl., 119-121, incl., 131, 135-138, incl. 240-241.

The government proved only that Calvin Nicholson died as the result of a gunshot wound administered by appellant. Evidence which related appellant to the killing consisted of two threshold statements he made to the police[2] immediately following his arrest. Nowhere in these statements did appellant give an account of the shooting, nor did he give a reason for its occurrence. This was the posture of the evidence when the court denied the motion for acquittal at the close of the government's case.

It is understood and agreed that upon a motion for judgment of acquittal at the close of the government's case the judge "must assume the truth of the government's evidence and give the government the benefit of all legitimate inferences to be drawn therefrom."[3] In clearing away the confu-

---

2/ To officer Gough: "I am the fellow that shot Calvin" and (the gun is) "on top of the refrigerator." Gough also answered, "No, he (appellant) gave no explanation as to why he shot him, except that on the way to the station he said he had some trouble with him."

To officer Couture: (Couture) "Did you do the shooting? He said yes. What did you do with the gun? He said I gave it to the detective."

3/ Curley, et al. v. United States, 81 U.S. App. D.C. 389, 160 F. 2d 229.

sion which had attended repeated applications of the motion for acquittal rule, this Court, in Curley, supra, concisely defined the criteria which regulate a proper application of the rule:

> ". . . if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted." Curley, et al., v. United States, supra, at pages 392, 393.

Appellant was tried on a charge of manslaughter.

> "To convict of manslaughter it is necessary to prove beyond a reasonable doubt that the accused's act which produced the wound was unlawful, and that the wound caused the death." 3 Warren on Homicide 383.

Applying the rule to the definition, it was necessary that the government produce evidence which either directly or by legitimate inference could form the basis for a reasonable mind fairly to conclude that appellant's firing of the shot which killed Nicholson was unlawful.

It is felt that equally legitimate inferences of accidental, justifiable and unlawful killing can be drawn from the government's evidence. The Court grounded its denial of the motion for acquittal upon its view that the facts elicited raised the inference that the killing was unlaw-

ful.[4/] The Court's conclusions were not warranted. First, the fact that the bullet entered "in a downward position in the decedent's body" raises only an inference that decedent was shot by a gun presented in such a position as was necessary to deliver the bullet as it did. Secondly, officer Gough's testimony that appellant had told him that he "had had some trouble with him (decedent)," raises no inference at all. The time, place, and nature of the trouble were not placed or explained. Nor was this fragment by any evidence related to or connected with the shooting itself.

4/ Judge Youngdahl gave his reasons (for the earlier denial of the motion for acquittal) at the close of the case: "I didn't state for the record before, which I think I should state for the record, my reason for not granting judgment of acquittal at the close of the Government's case, the defendant contending that the Government hadn't established a prima facie case. I think there were enough circumstances in the evidence in addition to the testimony that the defendant shot the decedent to make a prima facie case to the jury. Number one, it appeared without dispute from the Coroner's testimony that the bullet entered in a downward position in the decedent's body, so decedent must have been shot when he was on the ground. At least, the jury could reasonably infer that the defendant shot when the decedent was on the ground.

In the second place, it appeared from the Government's testimony that the defendant had stated that he had some trouble with the decedent, and I think those circumstances together with the positive testimony that decedent was shot, and that the shooting was proximately the cause of death, was enough to go to the jury and for them to determine whether defendant was guilty of either manslaughter or assault with a dangerous weapon, a prima facie case."

Thus, equally persuasive inferences of accident, justification and unlawfulness were present at the close of the prosecution's case. Balanced against the presumption of appellant's innocence,[5] it is clear that the government failed to satisfy its burden of proof, and that appellant's motion for judgment of acquittal should have been granted.

It is recognized that a doctrine of waiver has been applied when a defendant elects not to rest upon his motion at the close of the government's case, but rather to produce evidence in his own behalf. This doctrine was apparently taken in toto from its analogous civil law application and superimposed upon criminal procedure. The journey from civil to criminal law does not appear to have been carefully considered or separately analysed, but rather to have been sanctioned simply because it existed in the Civil law.[6]

The soundest interpretation would seem to lie in a literal reading of Rule 29 (a), which compels the grant of a motion if the evidence is insufficient at the close of either

---

5/ Pierce v. United States, 252 U.S. 239, 64 L Ed. 542.

6/ State v. Goldstein, 168 F 2d 666, 670
Leyer v. United States, 183 Fed. 102, 104
State v. Meadows, 330 Mo. 1020, 1026, 51 S.W. 2d 1033, 1036
Also see "The Motion for Acquittal: A Neglected Safeguard", 70 Yale Law Journal 1151, 1162.

case. (Emphasis mine). It is illogical, and fundamentally unfair, to say that a defendant can, or has the burden to, correct the judicial error of failing to comply with a statute when application of that statute is appropriate. This is analogous to the arguments long used by opponents of the so-called Federal Exclusionary Rule. If the evidence is competent and relevant the government, or the court, should not be deprived of any benefit from its use simply because it was illegally obtained. The argument was long ago rejected, as should the present "rule" which permits the defendant to be "boxed out of his Rule 29 (a) rights."[7/]

The instant case is a perfect illustration of a court allowing a prosecutor to wait" hopefully for (defendant) to convict himself."[8/]

Accordingly, this Court should re-examine the waiver doctrine, and discard it. This can be accomplished by a literal adherence to the mandate of Rule 29 (a).

7/ Cephus v. United States, _____U.S. App. D.C._____, No. 17, 712, decided September 12, 1963; concurring opinion of Judge Wright.

8/ Ibid.

II. TRIAL COURT ERRED IN NOT DIRECTING JUDGMENT OF ACQUITTAL, n.o.v., BECAUSE JURY'S VERDICT WAS INCONSISTENT WITH THE EVIDENCE.

With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: T.R. 296, 297.

Appellant's evidence raised only one defense, that of self-defense. All of the elements of the crime of manslaughter were either admitted or stipulated by appellant, except the element of unlawfulness. The only answer to the government's charge that the killing was unlawful was appellant's answer that he had shot in self-defense.

The act which caused the killing was appellant's assault upon decedent with appellant's deadly weapon. Thus, the assault upon decedent was an integral part of the killing. If appellant was defending himself by killing decedent, it necessarily follows that he had to be defending himself when he committed the act which caused the killing. Put another way, if appellant had the right to kill, he must have had the right to shoot.

Accordingly, the jury's acceptance of appellant's asserted right to kill---the killing was found to be lawful---must necessarily include an acceptance of an asserted right to commit the act which caused the death.

This point may be one of first impression, in that appellant's research failed to uncover any cases for or against the principle. Language found in a case from this court--- denying a requested instruction on a lesser included offense--- seems to be based upon the same logical premise.[9/]

Accordingly, the trial court erred in refusing to grant appellant's motion for judgment of acquittal, n.o.v..

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in this cause should be reversed with directions to enter judgment of acquittal.

/s/ John W. Karr

John W. Karr

/s/ Paul McElligott

Paul McElligott

Attorneys for Appellant
(Appointed by the
District Court)
644 Washington Bldg.
Washington, D. C.

9/ MacIlrath v. United States, 88 U.S. App. D.C. 270, 271. "Obviously the shooting, if not accidental, was nothing less than an assault with a dangerous weapon."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally served on the United States Attorney by having a copy of the same at his office, U. S. Courthouse, Washington, D. C., this 24th day of January, 1964.

/s/ John W. Karr

John W. Karr

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,251

LEON BARTLEY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

John W. Karr
Paul J. McElligott

644 Washington Building
Washington, D.C., 20005

Attorneys for Appellant,
(Appointed by the
District Court)

I N D E X

TABLE OF CASES AND CITATIONS

STATUTES AND AUTHORITIES

I. "DEADLY WEAPON DOCTRINE" IS NOT APPLICABLE TO MANSLAUGHTER PROSECUTION, ATTEMPT TO JUSTIFY PRESUMPTION OR INFERENCE OF UNLAWFULNESS, BY APPLICATION OF "DEADLY WEAPON DOCTRINE", PRODUCES RESULT WHICH IS INCONSISTENT WITH MOST FUNDAMENTAL PRESUMPTION IN A CRIMINAL CASE - THAT OF INNOCENCE.

Appellee grounds its contention that the government established a prima facie case of manslaughter on what it claims is a "well established principle of law that a homicide with a deadly weapon, in itself, justifies a factual inference or presumption that there existed in the mind of the assailant an intention to take life." (Emphasis supplied) (Appellee's Br. 8).

This hypothesis rests upon an application of the "Deadly Weapon Doctrine", an expedient rooted in a line of 17th century English cases,[1] the decisions in all of which placed a limitation upon the excessive use of physical chastisement in a relationship in which such use was a matter of license (e.g. husband-wife, master-servant, parent-child).

The modern formulation of the Deadly Weapon Concept was achieved in The Queen v. Eagle, 2 F. & F. 827, 175 Eng. Rep. 1305 (N.P. 1862), in which the Court said:

******

[1] Watts v. Brains, Cro. Eliz. 779, 78 Eng. Rep. 1009 (Q.B. 1600). Halloway's Case, Cro. Car. 131, 79 Eng. Rep. 715 (K.B. 1628). Grey's Case, Kel, J. 64, 84 Eng. Rep. 1084 (K.B. 1666). Rex v. Keite, 1 Ld. Raym. 138, 91 Eng. Rep. 989 (K.B. 1697).

"The essence of the crime of murder is malice prepense, and the law implies malice where one has killed another by the use of a deadly weapon, unless the circumstances rebut the inference, and reduce the offense to manslaughter."

This doctrine has since been invoked in many state cases, including those cited by Appellee, and in some Federal cases. In Marcus v. U.S., 66 App. D.C. 298, 305, cited by Appellee, this Court quoted the following with approval:

"A wrongful act is malicious if the injurious consequences following it are those which might naturally be expected to result from it, and which the person doing the act must be presumed to have had in mind at the time. In other words, while actual malice is ordinarily a question of fact for the jury, legal malice is a presumption of law, and, though it might be true that in the commission of an unlawful act the defendant was not activated by hatred or revenge or passion toward the plaintiff, nevertheless, if he acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice..." 18 R.C.L. 4; Commonwealth v. York, 9 Metc. (Mass) 93, 43 Am. Dec. 373. (Emphasis Supplied).

In Liggins v. United States, 54 App. D.C. 302, 297 Fed. 881 (1924), also relied upon by Appellee, this Court found a legal presumption of malice arising from a pistol caused homicide, but only after it had found that the defendant had no right to fire the revolver (the finding of an unlawful act) and had performed other acts at the time of the homicide which demonstrated that he was possessed of "a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind

deliberately bent on mischief." Liggins, Supra, at p. 306.

Thus, it can be seen that the only function of the deadly weapon doctrine, is to supply the element of legal malice to the charge of murder, by inference or presumption, when it is not otherwise factually demonstrable. But appropriate use of the concept is distinguishable from that employed by Appellee on three important bases:

(1) The use of the deadly weapon must first be found to be unlawful;

(2) Once the burden of proving unlawful use is satisfied, the unlawful use can then raise a legal presumption of malice, for the purpose of supplying a required element of a murder charge;

(3) The presumption (or inference) is a legal, not factual, presumption or inference.

The government seeks here to short-circuit the historical and modern requirement that a prerequisite finding of unlawful use of the deadly weapon be made. This Court is asked to extend the application of this ancient doctrine into an area in which it has heretofore had no place. Neither reason nor precedent is offered to support this requested enlargement.

Formidable reason, it would seem, militates against such an extension. The strongest presumption known to law is that

of the innocence of the accused. In its leading decision on the presumption of innocence, the Supreme Court said:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law." Coffin v. U.S., 156 U.S. 432,435; 15 S.Ct. 394, 403; 39 L. Ed. 481, 491.

And Wigmore says:

> "The presumption of innocence is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the Common law." 9 Wigmore on Evidence (3rd Ed.) §2511, 406, et seq.

Stating that the presumption of innocence is actually another expression of the accepted rule of the burden of proof in criminal cases, Wigmore shows the special and additional purpose which this presumption serves:

> "However, in a criminal case the term does convey a special and useful hint, over and above the other form of the rule about the burden of proof, in that it contains the jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment, and to reach their conclusion solely from the evidence adduced." 9 Wigmore on Evidence (3rd Ed.) §2511, 407.

To permit an inference (or presumption) of unlawfulness, therefore, to be raised upon proof only of a killing, is to vitiate completely this cornerstone of criminal justice, the presumption of innocence.

Analogy may be drawn between the theory here advanced and the holdings in cases in which statutory presumptions are a factor. The Supreme Court, on a due process analysis, has invalidated statutes when presumptions are created which have no rational connection between the fact proved and the ultimate fact presumed.[2]

The conclusion reached is that the deadly weapon doctrine has no application to this case, a prosecution on a charge of manslaughter. The burden rested upon the government--in order to establish its prima facie case--to prove beyond a reasonable doubt that the shooting was unlawful, that the defendant was without right to shoot. This finding being prerequisite to a finding that the killing was unlawful, the government failed to make out a prima facie case, and judgment of acquittal should have been entered at the close of its case.

II. IT WAS PLAIN ERROR FOR THE TRIAL COURT TO GIVE AN ASSAULT INSTRUCTION, AND THE JURY'S INCONSISTENT VERDICT SHOULD HAVE BEEN CURED BY GRANTING JUDGMENT OF ACQUITTAL, N.O.V.

Appellee implies, without stating, that Appellant waived his right to claim error by not objecting to the trial Court's charge of assault with a dangerous weapon. Without presuming

******

[2] Tot v. United States, 319 U.S. 463

upon the government's argument, it is clear that this Court may notice plain error.[3]

The government has misunderstood the "inconsistent verdict" theory.[4] Inconsistent verdicts are allowed in a case following an indictment returned in several counts. The issue in the Dunn case[4], cited by Appellee, was one of a verdict rendered on one count of the indictment which was inconsistent with a verdict rendered on another count of the indictment. Most of the cases that have interpreted Dunn, supra, have found that its decision was based on the separability of multiple count . If each count could be tried separately, and different verdicts reached, it followed that inconsistent verdicts in a trial of the consolidated counts did not offend due process requirements or impugn the integrity of the rule. Eight of the nine federal circuits that have analysed Dunn have come to this conclusion.[5]

******

[3]Rule 52 (b), Federal Rules of Criminal Procedure.
[4]Rule 31 (c), Federal Rules of Criminal Procedure.
[5]4th - Call v. U.S., 265 Fed. 167 (1959)
5th - Le Prell v. U.S., 192 F2d 132, 133 (1951)
6th - Friedberg v. U.S., 207 F2d 777 (1953)
7th - U.S. v. Denny, 165 F2d 668, 670 (1947)
8th - Anderson v. U.S., 262 F2d 764 (1959)
9th - Walker v. U.S., 176 F2d 796, 798 (1949)
10th - Blackford v. U.S., 195 F2d 896, 899 (1952)
D.C. - Gillars v. U.S. 182 F2d 962, 967 (1950)

However, it has never been held that inconsistency in verdict is permissible in each count itself. c.f. Mogall, et al. v. United States, 158 F2d 792. Hansborough, [6] principally relied upon by Appellee, involved a determination of degree of homicide, a matter well within the factual range of the jury's ability to judge (premeditation, malice, etc.). Here, the only issue was lawfulness--the killing was either lawful or it was not. Had the jury rejected Appellant's only offered defense, its sole alternative was to convict.

Respectfully submitted,
John W. Karr
Attorney for Appellant
644 Washington Building
Washington 5, D.C.

******

[6] Hansborough v. U.S., 113 U.S. App. D.C. 392, 309 F2d 645

APPENDIX

Rule 31 (c), Federal Rules of Criminal Procedure, states as follows:

> "Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Rule 52 (b), Federal Rules of Criminal Procedure, states as follows:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,251

LEON BARTLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
ALAN KAY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant, charged with manslaughter was convicted of assault with a dangerous weapon. He admitted to the fatal shooting of one Calvin Nicholson. The Government's case-in-chief established that at the time appellant was arrested be admitted that he shot the deceased but did not offer any reason for the shooting. The coroner testified that Nicholson died as a result of the gunshot wound. In view of the foregoing, appellee submits that the following questions are presented:

1. Whether the District Court properly denied appellant's motion for a judgment of acquittal at the close of the Government's case, said motion alleging the failure of the Government to present a prima facie case of manslaughter.

   a. Where the evidence adduced, conclusively established that the deceased died as a result of a gunshot wound inflicted by appellant.
   b. Appellant admitted to the police that he had shot the victim.
   c. Where the trajectory of the bullet through the victim's body would justify a conclusion that the victim was on the ground when the bullet entered his body.

2. Whether appellant's motion for a judgment of acquittal notwithstanding the verdict of the jury finding him guilty of assault with a dangerous weapon, based upon his assertion that the verdict was inconsistent, was properly denied.

   a. Where the only defense interposed by appellant was that of self defense.
   b. He did not object to the trial court instructing the jury on the lesser included offense of assault with a dangerous weapon.

INDEX

TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,251

LEON BARTLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed August 21, 1961, charged appellant with second degree murder (Tr. 8). On January, 1962, a jury convicted him of manslaughter (Criminal Case No. 702-61). Thereafter, appellant appealed to this Court and the conviction was reversed. *Bartley* v. *United States*, 115 U.S. App. D.C. 316, 319 F.2d 717 (1963).

On September 23, 1963, appellant was again brought to trial upon the charge of manslaughter (22 D.C. Code 2405). A jury found him guilty of assault with a danger-

ous weapon. By judgment and commitment filed October 15, 1963, appellant was sentenced to two to six years imprisonment. From this judgment appellant has perfected this appeal.

Government's Evidence

The evidence showed that in the early morning hours of July 29, 1961, members of the Metropolitan Police Department responded to an alleged shooting that occurred in the 600 block of Maryland Avenue, N.E. (Tr. 103). The victim of the shooting, identified as Calvin Nicholson, was found lying on the sidewalk (Tr. 103-104). Nicholson was pronounced dead at 3:45 a.m. upon his arrival at Casualty Hospital (Tr. 100).

The Deputy Coronor, Dr. Rayford, testified that Nicholson died as a result of a gunshot wound. "The tract from this wound was downward and slightly to the right to perforate the left lung and the heart" (Tr. 114-115). The bullet entered the body from a position above the shoulder (Tr. 115).

Detective Gough, responded to the scene of the shooting. As a result of information given to him by witnesses at the scene, he attempted to locate the suspect in the shooting (Tr. 119). Eventually he was directed to appellant's home address. Simultaneous with his arrival at appellant's home, Detective Gough received a message from the police dispatcher that a Leon Bartley had "called in to give himself up" (Tr. 124). Gough proceeded to appellant's room. "I walked into the room and the defendant was seated at a table. I said, who are you? He said, I am the fellow that shot Calvin. I said, where is the gun? He said, on top of the refrigerator" (Tr. 120). Appellant gave no explanation as to why he shot Nicholson except that he told Detective Gough he had had "some trouble" with him (Tr. 121).

Appellant's counsel stipulated that the victim, Calvin Nicholson, was shot by the appellant (Tr. 97).

Appellant's Evidence

Catherine Tardy, the apex of a love triangle involving appellant and the deceased, testified that in the evening hours of July 28, 1961, appellant escorted her to a night club (Tr. 146-147). The arrival of the deceased, Nicholson, prompted appellant and Mrs. Tardy to leave the night club (Tr. 155). They then proceeded to a friend's apartment at 619 Maryland Avenue, N.E. (Tr. 156). When they left the apartment about 3:00 a.m., they again encountered Calvin Nicholson. Nicholson struck Tardy and then went over to appellant. According to Tardy the deceased had an object in his hand which she described as a "long thing, looked like something black on the end of it, and he had it wrapped around his arm" (Tr. 164). As he approached appellant he tripped on a streetcar platform in the middle of the street and went down on one knee. As he commenced to get up, appellant shot him (Tr. 167, 186).

Appellant testified that after Nicholson struck Tardy, he went over to appellant and struck him and then "reached in his pocket and attempted to get a club to hit me, and I shot him" (Tr. 203). Later he testified that when he shot Nicholson, the deceased had a club in his hand attempting to strike him (Tr. 204). Appellant left the scene after the shooting and was arrested later in the morning at his home by Detective Gough (Tr. 221).

At the close of the government's case appellant moved for a judgment of acquittal. Rule 29, F.R.Cr.P. Again at the close of the entire case appellant moved for a judgment of acquittal, and after the jury verdict appellant moved for an acquittal notwithstanding the jury verdict. (Tr. 137, 240, 296).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2405, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

Rule 29 of Federal Rules of Criminal Procedure provides:

> (a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 31 of Federal Rules of Criminal Procedure provides in pertinent part:

> (c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

SUMMARY OF ARGUMENT

I

Appellant charged with manslaughter was convicted by a jury of assault with a dangerous weapon. The government's evidence disclosed that appellant admitted to fatally shooting the deceased with a pistol. Appellant's defense of self-defense was not disclosed to the police at the time of his arrest. Appellant contends that the government failed to establish that the shooting was 'unlawful', a necessary prerequisite to a prima facie case of manslaughter. This contention ignores a fundamental inference that a jury is permitted to draw from evidence showing a homicide committed with an inherently dangerous weapon, namely, that the fatal wound was inflicted with a criminal or unlawful intent to kill. The equally logical inferences of accidental or justifiable homicide that appellant claims can be drawn from the facts are affirmative defenses that are incumbent upon a defendant to raise at trial. The government's case clearly established a prima facie case of manslaughter sufficient to go to a jury and the trial court properly denied appellant's motion for a judgment of acquittal. Additionally, appellant's election to present evidence waived his right to seek review of the evidence presented in the prosecution's case-in-chief.

II

Appellant's assertion that the jury verdict finding him guilty of the lesser included offense of assault with a

dangerous weapon is inconsistent, lacks merit. The trial court's instructions on manslaughter and the lesser offense of assault with a dangerous weapon met with appellant's approval. His argument that the verdict indicated that the jury concluded that his defense of self-defense absolved him from criminal responsibility for the homicide and therefore of necessity should have absolved him from criminal responsibility for the assault resulting in the homicide, is based upon speculation. Even assuming that the verdict was inconsistent, if the verdict is supported by the evidence, any inconsistency in the verdict is not a sufficient basis for setting aside the conviction. In the instant case the testimony of the appellant admitting the fatal shooting was sufficient evidence to support a jury verdict of assault with a dangerous weapon. Thus the trial court's refusal to set aside the verdict of the jury was proper.

ARGUMENT

I. The District Court properly denied appellant's motion for judgment of acquittal made at the close of the Government's case-in-chief.

(See Tr. 74, 97, 114-115, 118-125)

Appellant contends that the Government did not establish a prima facie case of manslaughter, and that his motion for judgment of acquittal at the close of the Government's case-in-chief should have been granted. This assignment of error is without merit on two grounds.

A. *The Government Did Establish A Prima Facie Case Of Manslaughter*

Officer Gough of the Metropolitan Police Department responded to the scene of a shooting in the 600 block of Maryland Avenue, in the District of Columbia. (Tr. 118). As a result of questioning witnesses at the scene of the shooting, he ascertained the identity of appellant as a possible suspect (Tr. 119-120). He then proceeded to

an address where he believed that he could locate appellant (Tr. 120, 124). Simultaneous with his arrival he received a message over the police radio that appellant had called the police department "to give himself up" (Tr. 124). Officer Gough was the first police officer to arrive at appellant's residence. "I walked into the room and the defendant was seated at a table. I said 'Who are you? He said, I am the fellow that shot Calvin. I said, Where is the gun? He said, On top of the refrigerator." (Tr. 120). Appellant gave no explanation of the shooting other than the statement that he had had some trouble with the deceased (Tr. 121). Appellant's counsel[1] stipulated that the deceased, Calvin Nicholson, was shot by the appellant (Tr. 97).

The coroner, Dr. Rayford, testified that Nicholson died as a result of a gunshot wound; that the bullet entered Nicholson's left shoulder and travelled downwards perforating his left lung and his heart (Tr. 114-115).

The above stated facts were proven in the Government's case-in-chief. We submit that this evidence was sufficient for a jury to find appellant guilty of manslaughter or even second degree murder had he been so charged.

The standard to be applied by the District Judge when passing upon a motion for a judgment of acquittal is now well settled in this jurisdiction:

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and *draw justifiable inferences of fact*, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; [Emphasis supplied] *Curley* v. *United*

---

[1] Appellant's present counsel was trial counsel in the District Court.

States, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

See also, *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954); *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953); *Thomas* v. *United States*, 93 U.S. App. D.C. 392, 211 F.2d 45, *cert. denied*, 347 U.S. 969 (1954); *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438, *cert. denied*, 341 U.S. 905 (1950).

Appellant's contention that the Government failed to prove the criminal intent necessary to sustain a conviction of manslaughter ignores the well established principle of law that a homicide with a deadly weapon, in itself, justifies a factual inference or presumption that there existed in the mind of the assailant an intention to take life. Inference: *State* v. *Mathis*, 92 Ariz. 194, 375 P.2d 388 (1962); *Commonwealth* v. *Moore*, 398 Pa. 198, 157 A.2d 65 (1959); *People* v. *Besold*, 154 Calif. 363, 97 Pac. 871 (1908); *State* v. *Bucanis*, 26 N.J. 45, 138 A.2d 739 (1958). A presumption *Ayers* v. *State*, 214 Ga. 156, 103 S.E. 2d 574 (1958).

Appellant argues that "equally legitimate inferences of accidental, justifiable and unlawful killing can be drawn from the government's evidence" (Appellant's Br. 9). This argument is untenable. Cf. *Liggins* v. *United States*, 54 App. D.C. 302, 297 Fed. 881 (1924). The government's evidence showed that appellant shot Nicholson, and appellant does not dispute this fact.[2] The 'unlawfulness' of the shooting can be legitimately inferred from appellant's use of a dangerous weapon. Indeed, if appellant had been charged with second degree murder, malice could properly be implied from the government's evidence. *Bishop* v. *United States*, 71 U.S. App. D.C. 132, 107 F.2d 297 (1939); *Marcus* v. *United States*, 66 App. D.C. 298, 86 F.2d 854 (1936); *Patten* v. *United States*, 42 App.

---

[2] Appellant's admission coupled with the proof of the *corpus delicti* did not require further corroboration. *Wong Sun* v. *United States*, 371 U.S. 471, 489 at n.15 (1962).

D.C. 239, (1914). If a defendant, as appellant did here, seeks to justify his criminal act by raising the defense of self defense, it is incumbent upon *him* to interpose the defense. *Gunther* v. *State*, 228 Md. 404, 179 A.2d 880 (1962); *Cosby* v. *State*, 269 Ala. 501, 114 So.2d 250 (1959).

The Government's evidence showing that Nicholson died as a result of a gunshot wound inflicted by appellant and appellant's admission that he shot Nicholson clearly established a prima facie case of manslaughter and the District Court properly denied appellant's motion for a judgment of acquittal.[3]

B. *Appellant's Decision To Introduce Testimony Waived His Right To Assign Error To The District Court's Denial Of His Motion To Acquit On The Government's Evidence*

Appellant's election not to rest his case at the close of the Government's case-in-chief effectively waived his right to assign error to the District Court's refusal to grant his motion for a judgment of acquittal. He does not challenge the vitality of the doctrine of waiver in this jurisdiction, but rather suggests that the doctrine should be abandoned. Suffice it to say that the doctrine still applies in this jurisdiction and a majority of the circuits.[4] *Cephus* v. *United States*, —— U.S. App. D.C. ——, 324 F.2d 893 (1963); *Hall* v. *United States*, 83 U.S. App. D.C. 166, 168 F.2d 161, *cert. denied*, 334 U.S. 853, *reh. denied*, 335 U.S. 839 (1948); *Ladrey* v. *United States*, 81 U.S. App. D.C. 127, 155 F.2d 417, *cert. denied*, 329 U.S. 723 (1946).

---

[3] It is interesting to note that appellant's trial counsel conceded that the Government established a prima facie case (Tr. 74).

[4] See, *United States* v. *Calderon*, 348 U.S. 160 (1954); *Corbin* v. *United States*, 253 F.2d 646 (10th Cir. 1958); *Anderson* v. *United States*, 253 F.2d 419 (9th Cir. 1958); *Jackson* v. *United States*, 250 F.2d 897 (5th Cir. 1958); *McDonough* v. *United States*, 248 F.2d 725 (8th Cir. 1957); *United States* v. *Thayer*, 209 F.2d 534 (7th Cir. 1954); *Gaunt* v. *United States*, 184 F.2d 284 (1st Cir. 1950), *cert. denied*, 340 U.S. 917.

II. Appellant's motion for a judgment of acquittal notwithstanding the jury verdict was properly denied by the District Court.

(Tr. 186, 227, 239, 240-241, 290, 295)

Without objection (Tr. 239, 290), the trial court instructed the jury that they could return a verdict of guilty of manslaughter, guilty of assault with a dangerous weapon or not guilty. The jury returned a verdict of assault with a dangerous weapon (Tr. 295). See Rule 31(c) F.R.Cr.P. Appellant now claims that the verdict was inconsistent because as he views the evidence the verdict could only be guilty of manslaughter or not guilty. He erroneously concludes that because the jury saw fit to find him guilty of assault with a dangerous weapon they necessarily acquitted him of manslaughter on the ground of self-defense.

Appellant admitted that he killed Nicholson and interposed the sole defense of self-defense. The propriety of the court's instruction on the lesser offense of assault with a dangerous weapon was not raised in the District Court prior to the jury verdict. Clearly, assault with a dangerout weapon is a lesser included offense of a homicide committed with a pistol. *Logan* v. *United States*, 144 U.S. 263, 307 (1892); *United States* v. *Hamilton*, 182 F.Supp. 548 (D.C.D.C. 1960). In substance, appellant argues that he was tried for the offense of manslaughter and that the facts as presented required the jury to conclude either that he was guilty of manslaughter or that he killed in self-defense. The same argument was asserted and rejected by this Court in *Hansborough* v. *United States*, —— U.S. App. D.C. ——, 308 F. 2d 645 (1962). Appellant maintains that the jury improperly returned a verdict of assault with a dangerous weapon. The court's instruction that appellant could be found guilty of the lesser offense, was given with appellant's knowledge and agreement. In order to render a jury instruction on lesser included offense improper there must be a complete ab-

sence of evidence to support a conviction of that offense. *Hansborough* v. *United States, supra; Kinard* v. *United States,* 68 U.S. App. D.C. 250, 96 F.2d 522 (1938); *Stevenson* v. *United States,* 162 U.S. 313 (1896). This standard for determining the propriety of an instruction on a lesser included offense applies whether or not the defendant wants the instruction. The trial court's duty is to instruct the jury on the law applicable to the facts before them. *Chaifetz* v. *United States,* 109 U.S. App. D.C. 349, 288 F.2d 133, 136 (1960).

A defendant charged with an offense has no right to waive an instruction on a lesser included offense if such an instruction is warranted by the evidence. Appellant here, has no right to put the jury to the choice of convicting him of manslaughter or acquitting him, unless there is a complete absence of evidence from which the jury might find him guilty of the lesser offense. *Cf. Askins* v. *United States,* 97 U.S. App. D.C. 407, 231 F.2d 741, *cert. denied,* 351 U.S. 989 (1956); *Owens* v. *United States,* 66 U.S. App. D.C. 104, 85 F.2d 270, *cert. denied,* 299 U.S. 540 (1936). *A fortiori,* if a defendant acquiesces in the giving of an instruction on a lesser included offense and the evidence is sufficient to justify it, he cannot thereafter complain if he was convicted of the lesser offense.

Applying these principles to the instant case, it is clear that there was no error in the court giving an instruction on assault with a dangerous weapon. Appellant admitted on the stand that he shot Nicholson (Tr. 227), and his statement was corroborated by his female acquaintance Catherine Tardy (Tr. 186).

Similarly, the jury verdict, finding him guilty of the lesser offense, albeit inconsistent in his view, is supported by the evidence. Assuming, without conceding, that the verdict was inconsistent, such inconsistency no doubt stemmed from the jury's unwillingness to convict him of manslaughter. This is precisely the kind of situation

envisaged by the Supreme Court in *Dunn* v. *United States*, 284 U.S. 390 (1932), wherein the Court held:

> Consistency in a verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. * * * The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction, the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity. * * * That a verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation of inquiry into such matter. *Id* at 393-394.

And see, *United States* v. *Dotterweich*, 320 U.S. 277 (1943); *Grant* v. *United States*, 255 F.2d 341 (6th Cir. 1958); *Gillars* v. *United States*, 87 U.S. App. D.C. 16, 182 F.2d 962 (1950); *Borum* v. *United States*, 284 U.S. 596, *aff'm, per curiam* 61 U.S. App. D.C. 4, 56 F.2d 301 (1932); *State* v. *Brundige*, 144 Kan. 849, 220 Pac. 1039 (1923).

Contrary to appellant's assertion that the jury necessarily acquitted him of manslaughter by accepting his defense of self-defense, the jury may well have rejected his defense completely.[5] Certainly the evidence could support a finding by the jury that appellant's use of the pistol exceeded the means necessary to protect himself from Nicholson. The testimony of the coroner clearly could support a finding by the jury that the deceased was shot while he was on the ground (Tr. 115). And the testimony of appellant and Mrs. Tardy with respect to the instrument[6] in the deceased's hand (Tr. 164, 192,

---

[5] See Tr. 240-241, for the trial court's reasons for denying appellant's motion.

[6] No instrument allegedly in the deceased's hand was ever introduced into evidence.

219), repeatedly referred to as a "club" by appellant's counsel, clearly could support a finding by the jury that no such instrument, in fact, existed. It is precisely these peregrinations and vagaries that juries are permitted to indulge in. *United States* v. *Dotterweich, supra.*

That it might have been more rational on the evidence for the jury to have convicted appellant of manslaughter instead of assault with a dangerous weapon does not lend support to his argument. Appellant ought not to be heard to complain in the name of logic or consistency of the jury's failure to convict him of manslaughter. If the evidence supports his conviction of the lesser offense—as it does—the conviction must be upheld.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
ALAN KAY,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 722407 733